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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ROXANA K. CHAMOUILLE,

Plaintiff, Cross-defendant and  
Respondent,

v.

KIRK BROWN,

Defendant, Cross-complainant  
and Appellant.

B321555

(Los Angeles County  
Super. Ct. No. 21STCV33767)

APPEAL from a judgment of the Superior Court of  
Los Angeles County, Kevin Clement Brazile, Judge. Affirmed.

Kirk Brown, in pro. per.; Law Office of Moses O. Onyejekwe  
and Moses O. Onyejekwe for Defendant and Appellant.

Buchalter, Robert M. Dato, Andrew H. Struve, and  
Jason E. Goldstein for Plaintiff and Respondent.

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This is an appeal brought by appellant Kirk Brown challenging an ejectment action judgment. Brown refused to move out of property his deceased wife bequeathed to her sister, respondent Roxana Chamouille. On March 26, 2020, the probate court found Brown had no legal right to live in the property and ordered Brown to vacate the property. Brown disobeyed the probate court's order and continued to live in the property.

During the ejectment action, Brown filed for bankruptcy and unsuccessfully sought to stay the ejectment action. In the bankruptcy court proceedings, Brown admitted that the probate court's order (1) was binding on him, (2) had directed him to vacate the property, and (3) Chamouille had demanded he vacate the property following entry of the latter order. According to the bankruptcy court, Brown also admitted he was required to vacate the property prior to the probate court's order and specifically, that on about October 28, 2019, he no longer had a right to live in the property. Brown represents on appeal that sometime after the June 2022 judgment in the ejectment action, he vacated the property.

Brown argues that under the doctrines of collateral estoppel, res judicata, and judicial estoppel, an earlier unlawful detainer action barred the ejectment cause of action before us. We do not agree because the unlawful detainer lawsuit was not litigated on the merits. Instead, the superior court instructed Chamouille to file the ejectment action in lieu of the unlawful detainer action. Brown also argues that he raised a triable issue of material fact barring summary judgment but identifies no such triable issue. Brown contends respondent was required to provide him certain notice but cites no notice requirement relevant to an ejectment action and merely refers to a statute

relevant to unlawful detainer actions. On appeal, Brown further argues that he should have had the opportunity to amend his cross-complaint but offers no proposed amendment. Finally, Brown argues his request to recuse the trial court judge should have been granted, but that issue is not cognizable on appeal. We thus affirm.

Respondent has moved for sanctions for a frivolous appeal. We issued an order to show cause why we should not impose sanctions for Brown’s filing this appeal. We agree with respondent that this appeal is frivolous and order Brown to pay \$15,000 in sanctions—the amount requested by respondent and an amount Brown does not challenge.

## **BACKGROUND**

This case involves real property located on Jasmine Avenue (the Property). Brown lived in the Property owned by his wife—Mandana Kabiri Brown—who died in January 2018.<sup>1</sup>

### **1. *Probate action***

In 2018 and 2019, Brown unsuccessfully attempted to contest Mandana Brown’s will. After lengthy proceedings, the probate court ordered Brown to vacate the Property. The probate court, however, indicated Chamouille had to bring an unlawful detainer action to remove Brown from the Property.

On August 19, 2021, Division Seven issued an opinion affirming the final distribution of Brown’s estate, which included

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<sup>1</sup> In the trial court, Pablo Crawford also was a defendant based on his trespassing on the Property. The judgment includes Crawford. Crawford is not a party to the appeal, and for that reason, we do not refer to him further.

award of the Property to Chamouille.<sup>2</sup> (*Estate of Brown*, (Aug. 19, 2021, B305891) [nonpub. opn.].) The opinion explained that Brown unsuccessfully tried to contest Mandana Brown’s holographic will. Division Seven stated, “In addition to approving the accounting, the [probate] court ordered Brown to vacate the Jasmine Avenue property.” Division Seven further explained that Brown did not object to the description of the Property as Mandana Brown’s separate property and presented no evidence that he had a community property interest in it.

In November 2021, the Supreme Court denied Brown’s petition for review. On November 18, 2021, the remittitur issued.

## **2. *Unlawful detainer action***

On September 13, 2021, Chamouille filed an unlawful detainer action (as suggested by the probate court). The court found that unlawful detainer was not an available remedy. The court “reiterate[d], Plaintiff’s proper course of action here is to file an action for ejectment . . . .”

## **3. *Complaint for ejectment***

On September 13, 2021, Chamouille filed a complaint for ejectment. She alleged that she owns the Property and has the right to its possession. Chamouille alleged the probate court denied Brown’s challenge to the will. According to Chamouille,

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<sup>2</sup> Finding good cause, on our own motion, we take judicial notice of the unpublished opinion of Division Seven of the Second District Court of Appeal. (*People v. Padilla* (1995) 11 Cal.4th 891, 961, fn. 6 [judicially noticing unpublished appellate court opinion], overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

title vested in her name on August 12, 2020. Chamouille alleged that Brown is trespassing on the Property and was in violation of a March 26, 2020 court order requiring him to vacate the Property. Chamouille further alleged that in addition to the probate court's order to vacate the property, on April 6, 2021, she served a three-day notice to quit and vacate the premises even though notice was not required in an ejectment action. Chamouille alleged that on January 6, 2021, the probate court ordered sanctions against Brown in favor of Chamouille.

Exhibit 1 to the complaint is an administrator's deed dated August 10, 2020, granting Chamouille all right title and interest in the Property. Exhibit 2 is a February 19, 2021 order by the probate court denying Brown's motion to stay commencement of eviction proceedings. Exhibit 3 is an order by the Superior Court indicating that the case "does not fall within the scope of the unlawful detainer statutes" and that Chamouille should file an action for ejectment.

Exhibit 4 to the complaint for ejectment shows that on March 26, 2020, the probate court found Brown had no legal right to live at the Property and must vacate the Property. The order stated: "IT IS FURTHER ORDERED that Kirk Brown must vacate the real property located at . . . Jasmine Avenue . . . ." The probate court also ordered Brown to pay \$2,000 in sanctions forthwith.

The exhibits to the ejectment complaint also include a three-day notice dated April 6, 2021, to quit and vacate the premises and a picture of it posted on the Property. Another exhibit showed that on January 6, 2021, the probate court ordered Brown to pay \$15,000 in sanctions for attorney's fees

Chamouille incurred in defending against multiple motions and false accusations that she was responsible for a homicide.<sup>3</sup>

**4. *Cross-complaint and demurrer to cross-complaint***

Brown filed a cross-complaint alleging that “he comingled his funds with [those of] his wife, now deceased, and together paid all household expenses, including mortgage payments; and further provided such improvements on said property [the Property] including ceiling jobs, carpeting, painting and gardening, and tree services, over the years they were together.” Brown estimated that his services totaled \$300,000. He asserted causes of action for quantum meruit and unjust enrichment.

Chamouille demurred to the cross-complaint arguing, among other things, that it was frivolous and barred by the two-year statute of limitations. The court sustained the demurrer without leave to amend.

**5. *Motion for and opposition to summary judgment***

Chamouille moved for summary judgment on the ejectment cause of action. She identified the following undisputed facts.

(1) Chamouille owns the Property; (2) in March 2020, the superior court ordered Brown to vacate the Property; (3) Division Seven affirmed the order; (4) the Supreme Court denied review; (5) the appellate court issued its remittitur; (6) Brown continues to occupy the Property without permission; and (7) Brown withheld possession of the Property. Chamouille argued that she satisfied the elements of an ejectment cause of

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<sup>3</sup> Notwithstanding the probate court’s award of sanctions against him, Brown makes the same accusations in his appeal. The accusations are not relevant to any issue on appeal.

action because she owns the Property and Brown was in wrongful possession of it.

Brown disputed the “validity” of Chamouille’s title without offering any evidence to support this purported disputed fact. Brown agreed that the superior court had entered an order granting a final account, but stated that order was “Based on Fabricated Holographic Will.” Brown asserted he “has occupied [the P]roperty since marriage to Manda[na] Kabiri Brown” and he is “in lawful possion [*sic*].” He offered no evidence to support his statement that he lawfully possessed the Property.

## **6. *Judgment***

On June 20, 2022, the court granted a judgment of ejection from the Property. The court awarded Chamouille immediate possession.<sup>4</sup>

## **7. *Brown files for bankruptcy***

During the ejectment action, Brown sought a stay of all superior court proceedings based on his filing of a bankruptcy petition. The bankruptcy court granted an order of relief from the automatic stay, which allowed Chamouille to pursue the current ejectment action. The bankruptcy court found Brown acted willfully and maliciously in trespassing on the Property for almost three years. The court also found that the debt arising from Brown’s malicious conduct was not dischargeable. The

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<sup>4</sup> Brown filed a notice of appeal before the trial court entered judgment. We deem the notice of appeal to be from the judgment. (*Mukthar v. Latin American Security Service* (2006) 139 Cal.App.4th 284, 288.)

bankruptcy appellate panel affirmed.<sup>5</sup> Brown noticed an appeal in the Ninth Circuit Court of Appeals. The record does not include any additional information about the Ninth Circuit appeal.

## DISCUSSION

To assert a cause of action for ejectment, the plaintiff must establish ownership of the disputed property and the defendant's wrongful possession of the disputed property. (*Nathan v. Dierssen* (1913) 164 Cal. 607, 610 ["The complaint contains every allegation necessary in an action of ejectment. It alleges ownership in plaintiff, that defendant wrongfully entered and dispossessed him and that he still keeps him out of possession."]); See 5 Witkin, Cal. Procedure (6th ed. 2021) Pleading, § 637, pp. 75–76 [elements of ejectment are "(1) The plaintiff's ownership of some interest in real property . . . [¶] (2) The defendant's possession and withholding . . . [¶] (3) Damage to the plaintiff, if any, and value of rents and profits, if recovery of their value is sought"].)

Here, the record conclusively shows that Chamouille owned the Property and Brown wrongfully possessed it. The administrator's deed dated August 10, 2020 granted Chamouille all right title and interest in the Property. Brown wrongfully

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<sup>5</sup> We grant respondent's motions to take judicial notice of the opinions of the bankruptcy court and bankruptcy appellate panel. (Evid. Code, § 451, subd. (a).) Brown describes the bankruptcy proceedings as "related" and we find those proceedings relevant. As both parties request, we take judicial notice that on July 25, 2023, Brown filed an amended notice of appeal in the Ninth Circuit.



possessed the Property in violation of the superior court’s March 26, 2020 order requiring that he vacate the Property. Indeed, Brown admitted in his opposition to summary judgment that he “has occupied property since marriage to Manda[na] Kabiri Brown.”

There is no evidence in the record supporting the inference that Chamouille did not own the Property or that Brown did not wrongfully possess it. Because Chamouille established the elements of a cause of action for ejectment and Brown identified no triable issue of material fact, the trial court did not err in granting summary judgment. (Code Civ. Proc., § 437c, subd. (c) [A motion for summary judgment is properly granted when “all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”].) For the reasons set forth below, Brown’s arguments on appeal lack merit; indeed they are frivolous.

**A. Res Judicata and Collateral Estoppel Do Not Bar the Ejectment Complaint**

Brown argues that because the complaint for ejectment contains the same allegations as the unlawful detainer complaint, the complaint for ejectment is barred under principles of res judicata and collateral estoppel. Res judicata and collateral estoppel preclude the relitigation of certain matters previously litigated. (*Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 556; see also *Kemp Bros. Construction, Inc. v. Tital Electric Corp.* (2007) 146 Cal.App.4th 1474, 1477 [party cannot relitigate issue previously fully and fairly litigated].)

No issue or claim was litigated in the unlawful detainer action because the court concluded that Chamouille should have filed an ejectment action instead of an unlawful detainer action.

Because no issue was litigated on the merits in the unlawful detainer proceeding, that proceeding does not bar any issue on the merits of the ejectment action before us. (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 849 [element of collateral estoppel requires actual litigation of issue].)

**B. Judicial Estoppel Does Not Bar the Ejectment Complaint**

Brown argues that the unlawful detainer complaint was already litigated and on that basis, Chamouille was judicially estopped from filing the instant complaint in ejectment. As set forth above, no issue on the merits of the ejectment action was litigated in the unlawful detainer action.

In addition, judicial estoppel does not apply in the first place. “The elements of judicial estoppel are ‘(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.’ [Citation.]” (*Owens v. County of Los Angeles* (2013) 220 Cal.App.4th 107, 121.)

Chamouille has not taken two inconsistent positions—she has always asserted ownership of the Property.

**C. Brown Identifies No Issues of Material Fact Precluding Summary Judgment**

Brown argues the trial court erred in granting summary judgment because he identified triable issues of material fact. Once Chamouille has met her burden to show no disputed material fact as to each element of her ejectment action, the

burden shifted to Brown to show a triable issue of one or more material fact exists. (Code of Civ. Proc., § 437c, subd. (p)(1).) Brown was required to “set forth the specific facts showing that a triable issue of material fact exists . . . .” (*Ibid.*)

The only purported material fact Brown identifies is whether the “right to possession” was litigated in the unlawful detainer action. As we have explained, the right to possession was not litigated in the unlawful detainer action. Instead, the court instructed Chamouille to file an ejectment action. Brown thus identifies no triable issue of material fact precluding summary judgment.

The right to possession already was litigated and resolved in Chamouille’s favor in the probate court. Under the probate court’s judgment, as affirmed by Division Seven of this Court, Brown had no right to possession.

#### **D. Notice Requirements in Code of Civil Procedure Section 1161 Do Not Apply**

Brown argues that respondent did not comply with notice requirements in Code of Civil Procedure section 1161. Section 1161 governs unlawful detainer actions. It defines unlawful detainer, and describes when a tenant is guilty of unlawful detainer and the notice a landlord must provide to the tenant regarding violation of lease conditions. (Code Civ. Proc., § 1161, subds. (1) & (2); see also *Bawa v. Terhune* (2019) 33 Cal.App.5th Supp. 1, 5 [in unlawful detainer action landlord must serve tenant with three-day notice].) The current action is not one for unlawful detainer. Brown articulates no theory under which section 1161 applies to this ejectment claim.

**E. Brown Demonstrates No Error in Sustaining the Demurrer to his Cross-Complaint Without Leave to Amend**

Brown argues that the trial court should have given him opportunity to amend his cross-complaint. Brown identifies no proposed amendment to his complaint.

“A party may propose amendments on appeal where a demurrer has been sustained, in order to show that the trial court abused its discretion in denying leave to amend. (Code Civ. Proc., § 472c, subd. (a).)” (*People ex rel. Brown v. Powerex Corp.* (2007) 153 Cal.App.4th 93, 112.) However, a vague claim that a plaintiff could amend the complaint is insufficient. (*Ibid.*) Brown identifies no possible amendment to the cross-complaint and therefore demonstrates no error in the trial court’s order denying Brown leave to amend the cross-complaint.

**F. Denial of Motion To Recuse Judge Brazille**

In the trial court, Brown unsuccessfully attempted to challenge Judge Kevin Brazile. On appeal, Brown argues that his motion to recuse Judge Kevin Brazille should have been granted. The order Brown seeks to challenge is not an appealable order. (*People v. Hull* (1991) 1 Cal.4th 266, 268 [writ of mandate exclusive means of review of unsuccessful peremptory challenge].)

**G. Respondent Is Entitled to Sanctions**

Chamouille requests \$15,000 in sanctions, arguing that the appeal is frivolous. Chamouille further contends the appeal is a continuation of Brown’s pattern and practice of harassing behavior. According to Chamouille, \$15,000 is less than the

actual fees she has incurred in this appeal. Counsel filed a declaration stating that his standard rate is \$600 and that he worked more than 25 hours on the appeal.

Brown filed an opposition arguing that his contentions discussed above are not frivolous and that he believed they are valid. Brown further contended his appeal was not taken for an improper purpose because the appeal has not yet been adjudicated. Brown does not dispute the requested amount of sanctions.

Our Supreme Court in *In re Marriage of Flaherty* (1982) 31 Cal.3d 637 set forth the applicable standard: “[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit.” (*Id.* at p. 650.) We must define frivolous to avoid a chilling effect on the assertion of litigants’ rights on appeal. “Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal.” (*Ibid.*)

Brown raises no issue that is even arguably correct. Any reasonable attorney would agree that Brown’s arguments indisputably have no merit and are therefore frivolous. Because the probate court’s order was affirmed on appeal and the finding that Chamouille owns the Property is final, no reasonable attorney would dispute Chamouille’s right to possess the Property. Brown admitted that he nonetheless continued to live in the Property—the remaining element of an ejectment cause of action. In sum, we conclude that in pursuing this appeal, Brown has forced Chamouille to defend against a meritless appeal.

Brown's filing this appeal has imposed an unnecessary burden on Chamouille and warrants imposition of sanctions. Brown does not contest the requested amount of sanctions—\$15,000. We conclude the amount is reasonable. (See Cal. Rules of Court, rule 8.276 [appellate court may impose sanctions for frivolous appeal].)

### **DISPOSITION**

The judgment is affirmed. Roxana K. Chamouille is awarded her costs on appeal. Kirk Brown only shall pay Chamouille \$15,000 as sanctions for pursuing a frivolous appeal.

NOT TO BE PUBLISHED.

BENDIX, Acting P. J.

We concur:

CHANEY, J.

WEINGART, J.